In a recent case in Ohio, *Ohio Farmers Ins. Co.* v. *Burget* (1901) 61 N. E. 712, personal property was insured contained in house A, with a condition of no removal. Removal was made to house B, then to house C, consent to the last removal being obtained. It was held that the avoidance intended by the warranty was only during the continuance of the forbidden hazard. This is patently opposed to the express terms of the policy. The warranty added nothing to the contract. The court justified its decision on the ground that a temporary suspension by temporary change of location must rest on the broad principle that a condition is available only during the existence of the hazard forbidden. It felt bound by these decisions on temporary suspension, and advanced no principle. As has been shown, the cause of temporary suspension lies in the non-existence of subject matter within the risk. If a warranty be broken, the insurer should be allowed the advantage of it at any time unless there has been a waiver. *Thomson v. Weems* (H. L. 1884). L. R. 9 A. C. 671. The principal case finds some support. Joyce, Ins. § 2289. *Contra*, see *Imperial Ins. Co.* v. *Jackson* (1892) 151 U. S. 542, and *Kyte* v. *Commercial etc. Ins. Co.* (1889) 149 Mass 116.

ATTEMPTED GIFT OF AN ACCOUNT IN A SAVINGS BANK, TO TAKE EFFECT UPON THE DEATH OF THE SUPPOSED DONOR.—Mrs. Roche, a widow, had a deposit in the Hoboken Bank for Savings. Intending that her nephew Schwoon should be provided for after her death, she went to the bank with him and had her account changed to read, "Roche or Schwoon in account with the Hoboken Bank for Savings, payable to either or survivor," at the same time signing a contract with the bank, to the effect that she and Schwoon were to be co-partners in the ownership of the money. Mrs. Roche kept the bank book and continued to draw small sums of money for her own use. Several months before her death she handed the book to a friend, directing him to deliver it to Schwoon after her death. After her decease one Seitz claimed the fund as legatee and the bank impleaded the parties. The court directed that the money be paid to Schwoon on the ground that putting the money into a joint account with right of survivorship, coupled with the fact that the pass book was delivered to a third person "for the donee," was a perfect declaration of trust. *Hoboken Bank for Savings* v. *Schwoon* (N. J. Ch. 1901) 50 Atl. 490.

While it would seem that the intention of the parties could be effectuated by calling this a gift, such a result, though reached in the case of *Howard* v. *Savings Bank* (1868) 40 Vt. 597, would be erroneous. The delivery of the bank book to the third party was not made in anticipation of death, hence on the very facts of the case, the idea of a gift *mortis causa* is negatived. Nor is there a valid gift *inter vivos*, for Mrs. Roche retained title to and dominion over the fund, whereas, to establish a gift, such title and dominion must be passed to the donee. *Savings Bank* v. *Merriam* (1895) 88 Me. 146. Schwoon was not to receive the book, till after the death of the donor, making the gift testamentary in character and void

under the New Jersey statute of wills. Furthermore, a gift *inter vivos* must of necessity take effect *in præsenti*. *Savings Bank* v. *Merriam, supra.*

The court, adverting to these facts, which would invalidate the transaction as a gift, gives the money to Schwoon on the ground that he is a *cestui que trust.* In so doing it loses sight of the fundamental rules of the law of trusts. While it is true that no special form of words is necessary for a declaration of trust, so long as the intention to create is clearly shown, *Marshall* v. *Crutwell* (1875) L. R. 20 Eq. 328, nevertheless, the creator must establish a trust *in præsenti* and must surrender control over the *res*, *Savings Bank* v. *Merriam, supra.* In putting the account in the joint names of herself and Schwoon, Mrs. Roche at most gave her nephew a power of attorney, revocable because not based on a consideration. And this power was revoked by her death. The court objects to this view of the case because Mrs. Roche's intention was to give the money to Schwoon after her death. In *Marshall* v. *Crutwell, supra,* a case on all fours with the one under discussion, the court reached the conclusion that, judging from the intention of the parties, a power of attorney only was given. In that case, the joint account was opened in the names of a husband and wife and, the husband being ill, the wife drew money for domestic expenses. While the court said this was merely an arrangement for convenience, as shown by the facts, the result was the only logical one. The depositor, in either case, could have drawn out all of the funds and the other party would have been unable to put an end to such drafts. *Savings Bank* v. *Merriam, supra.* Thus it will be seen that during the life of the depositor the co-partner, so-called, in the account has no interest in the money. At most, if he has possession of the bank book, he can draw on the fund, but is responsible to the depositor for any sums so drawn. He is but an agent for the depositor. Then, says the court in the principal case, it is the intention of the depositor that the co-partner shall have all that remains of the fund, at the time of her death. But this contention is answered by the rule that a trust must come into effect in the present and not in the future. *Bank* v. *Merriam, supra; Sullivan* v. *Sullivan* (1900) 161 N. Y. 554. The court cites several cases to support its trust theory. In but one, *Savings Bank* v. *Murphy* (1896) 82 Md. 314, were the facts identical with those in the principal case and the court there rested its decision on legal grounds; namely, that the survivor was by the contract of co-partnership, entitled to the money. The objection to this is that elements of partnership are wanting. In *Ray* v. *Simmons* (1875) 11 R. I. 266, the account was in the name of the depositor in trust for X. The depositor retained the pass book. The intention to create a trust having been established, DURFEE, C. J., says (p. 268), "It is enough if, having the property, he conveys it to another in trust, or, the property being personal, if he unequivocally declares, either orally or in writing, that he holds it *in præsenti* in trust, or as trustee for another." The case is therefore to be distinguished on the

ground that the trust was to go into effect at once, the depositor holding the bank book as trustee. The New York case of *Martin* v. *Funk* (1878) 75 N. Y. 134, has in effect been overruled by the later case of *Sullivan* v. *Sullivan*, *supra*. See also *Noyes* v. *Savings Institution* (1895) 164 Mass. 583.

LIABILITY FOR THE ACTS OF AN INDEPENDENT CONTRACTOR.—The rule that an employer is not ordinarily liable for the negligence of an independent contractor is of comparatively modern origin. 1 Bevan, Negligence, 718. It had been held that a person is answerable for any injury which arises in carrying into execution that which he has employed another to do, *Bush* v. *Steinman* (1799) 1 Bos. & P. 404; but Chief Justice EYRE, in that case, expressed grave doubts and professed his inability to give any sound reason for the doctrine.

One of the first American cases to decide the question squarely was *Blake* v. *Ferris* (1851) 5 N. Y. 48. The defendants secured a license from the city of New York to construct a sewer in a public street, and let the contract for the work to one Gibbon. Through the latter's failure to guard the excavation properly at night, the plaintiff's horses and carriage fell into it and were injured. The court after a full discussion of the authorities held that the rule *respondeat superior* did not apply to a case of an independent contractor. A like result was reached in *Pack* v. *The Mayor* (1853) 8 N. Y. 222 and *Kelly* v. *The Mayor* (1854) 11 N. Y. 422, in each of which the plaintiff was injured by reason of the negligence of an independent contractor in blasting under a contract for grading a public street. The decisions in these cases are broad enough to include all injuries inflicted by an independent contractor. An important limitation was, however, introduced by the case of *Storrs* v. *City of Utica* (1858) 17 N. Y. 104. The facts were much the same as in *Blake* v. *Ferris*, *supra*, except that the sewer was being built under a contract with the city. The court held that the city owed to the public the duty of keeping its streets in a safe condition for travel and was therefore liable for the neglect to keep proper lights and guards around an excavation which it had caused to be made by an independent contractor. The reasoning and general doctrine of *Blake* v. *Ferris* were approved but their applicability to that state of facts seriously questioned. In that case, said COMSTOCK, J. (at p. 107), "there was no complaint of negligence in the actual performance of the work. The ditch was carefully and skillfully dug. There was no careless projection of rocks against horses or travelers. The plaintiff's horses were driven into the ditch because it was not guarded at night. The cause of the accident, therefore, was not in the manner in which the work was carried on by the laborers; if it had been, their immediate employer, and he only, was liable for the injury. But in a sense strictly logical, as it seems to me, the accident was the result of the work itself, however skillfully performed. A ditch cannot be dug in a public street and left open and unguarded at night without imminent danger of such casualties. If they do occur, who is the author of the mischief? Is it not he who causes the ditch to be dug, whether he does it with his own hands, employs laborers, or lets it out by contract?"